

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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SHELDON PETER WOLFCHILD, et. al.,	)	
	)	
	)	
Plaintiffs,	)	
	)	Case No. 03-2684L
	)	and
v.	)	Case No. 01-568L
	)	(consolidated)
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	
	)	

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WOLFCHILD PLAINTIFF'S REPLY MEMORANDUM TO  
DEFENDANT'S MOTION TO AMEND COMPLAINTS

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The United States' opposition reflects a consistent misunderstanding of the historic agency record and the application of those facts to the law of the case. While the Appropriation Acts did not create a trust, and the 1980 Act did not repeal the Acts, the Federal Circuit nevertheless and necessarily described the existence of a statutory use restriction imposed on the government for the 1886 Mdewakanton. The United States omits an acknowledgement that the "statutory use restriction," as a claim, was not then before the Federal Circuit; thus, the government cannot say "the Federal Circuit did not recognize [it] as a claim."<sup>1</sup> Additionally, the United States asserts that the Plaintiffs' "proposed amendment ... fails to recognize that the Federal Circuit has held that they have no interest in the 1886 lands, legal or beneficial..."<sup>2</sup> Since the lands are held in trust *for the post-IRA communities*, neither do the individual members of those communities. The Appropriation Acts and related laws have restrictions on the legal and beneficial interests imposed on the post-IRA communities as it affects individuals — members, non-1886 Mdewakanton and 1886 Mdewakanton. The federal government's lack of enforcement of those restrictions is the issue - a claim arising from the Federal Circuit's holding.

### ARGUMENT

The United States is *incorrect* in arguing that the Federal Circuit "did not remand for further proceedings on the Appropriation Acts' statutory use

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<sup>1</sup> Def.'s Memo. to Dismiss at 5 (Aug. 9, 2010).

<sup>2</sup> *Id.*

restriction.”<sup>3</sup> First, the appellate court decided only *two certified questions*: the Appropriation Acts did not create a trust, and the 1980 Act terminated a trust if a trust existed. Yet, in answering those questions, the Federal Circuit “conclude[d] that the Appropriations Acts are best interpreted as merely appropriating funds subject to a statutory use restriction.”<sup>4</sup> And, while it is true the court further opined that the 1886 Mdewakanton and their descendants did not obtain “vested rights”<sup>5</sup> in the land held in trust, nowhere in the decision is it portrayed that post-IRA community *individual* members have any “vested rights” in the ownership of land held in trust by the United States.<sup>6</sup> Importantly, the Federal Circuit found that the 1980 Act did not repeal the Appropriation Act’s statutory use restriction.

Second, the Federal Circuit *did remand* this case to this Court to examine the Interior’s lawfulness of Interior’s post-1980 distributions to the post-IRA Communities of moneys collected from the “sale, use, or leasing of certain of the 1886 lands.”<sup>7</sup> Specifically, the appellate court noted that while this issue did not affect the trust analysis of the certified questions, it left the issue — and necessarily the origin of the legality or illegality of the government’s distribution — “*to the*

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<sup>3</sup> *Id.* at 7.

<sup>4</sup> *Wolfchild v. U.S.*, 559 F.3d 1228, 1240 (Fed. Cir. 2009) *cert. denied*, 130 S. Ct. 2090 (U.S. 2010).

<sup>5</sup> *Id.*

<sup>6</sup> The “[1980] Act [created] a trust in favor of the three communities and not granting or preserving beneficial ownership rights in the 1886 Mdewakanton descendants.” This statement does not preclude claims associated with statutory use restrictions embodied within the Appropriation Acts. If the appellate court intended to preclude the existence of governmental obligations to the 1886 Mdewakanton descendants it would have said so. *Wolfchild*, 559 F.3d at 1259, 1260 n.14.

<sup>7</sup> *Wolfchild*, 559 F.3d at 1260 n.14.

*extent necessary, in further proceedings before the trial court.*”<sup>8</sup> Therefore, the inquiry of the federal government’s statutory obligations to the 1886 Mdewakanton and their descendants is appropriately before this Court. As the appellate court determined, “[t]he Interior Department recognized ...that Congress intended the 1886 Mdewakantons to be the specific beneficiaries of the Appropriations Acts.”<sup>9</sup>

**I. Contrary to Interior’s arguments, the 1886 Mdewakanton are entitled to the monetary benefits of the communities.**

Despite Interior’s knowledge that the legal basis for the existence of the *post-IRA* communities arose from the Appropriation Acts’ statutory use restriction(s) in the first instance, the same restriction is the legal basis of Plaintiffs’ claim that the 1886 Mdewakanton are entitled to the benefits of the post-IRA Communities from the “sale, use, or leasing of certain 1886 lands.”<sup>10</sup>

For example, in 1974, the government recognized that 1886 Mdewakanton lineal descendants as beneficiaries of the communities’ revenues. Acting Associate Solicitor Duard R. Barnes indicated that IMPL account proceeds from all community enterprises and leases should be kept separate and expended for the benefit of the 1886 Mdewakanton as beneficiaries:

Proceeds from the leases should be kept separate and may be expended for the benefit of the class in such manner as the Secretary deems best consistent with his power under the trust.<sup>11</sup>

The Acting Associate Solicitor further stated that the communities have no specific

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<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> *Id.* at 1243.

<sup>10</sup> *Id.* at 1259.

<sup>11</sup> JA1087.

rights-granting statutes and the communities have non-1886 Mdewakanton members:

While the organization on these reservations are sometimes referred to as “tribal government”, they are not true governments possessing sovereign authority – their powers “are incidental to its ownership of property and its carrying on of business, and those which may be delegated by the Secretary.” Opinion of the Solicitor, April 15, 1936. The persons comprising the membership in these organizations are not all Mdewakanton – a sizable proportion are ethnologically members of other bands of Sioux.<sup>12</sup>

This is consistent with Plaintiffs’ claim. Although the government proposes the 1980 Act terminated the statutory use restriction as it relates to collected funds,<sup>13</sup> neither the Act’s text, the legislative history, nor the appellate court’s decision address Interior’s then-existing treasury accounts and the continued disbursement of community revenues. As the Federal Circuit found, the 1980 Act did not repeal the Appropriation Acts nor the statutory use restriction. The decision addressed only land -- not monetary benefits – such as the treasury accounts and gaming revenues claimed here.

**II. Contrary to the government’s opposition, the Federal Circuit did recognize a claim for statutory use restriction.**

The Federal Circuit did recognize a claim for statutory use restriction. The government asserts that it would be a “grave misreading” of the Federal Circuit’s opinion to read it for what it is: a finding of a non-trust statutory obligation.<sup>14</sup> Yet, it

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<sup>12</sup> JA1084. The Federal Circuit recognized that the communities have non-1886 Mdewakanton community members. *Wolfchild*, 559 F.3d at 1235 n. 2.

<sup>13</sup> Defs. Opp. Memo. to Amend (Aug. 9, 2010).

<sup>14</sup> Def.’s Opp. Memo to Amend 1 (Aug. 9, 2010).

is the law of the case:<sup>15</sup>

[W]e conclude that the Appropriations Acts are best interpreted as merely appropriating funds subject to a statutory use restriction, and not creating a trust relationship....<sup>16</sup>

Thus, the Plaintiffs' statutory use restriction claim is hardly "futile."

The government's opposition mistakenly argues that the Federal Circuit's remand is not broad enough to permit the Plaintiffs to pursue the statutory use restriction claim relying upon *Duncan Energy Co. v. U.S. Forest Service*.<sup>17</sup> But, the instant proceeding is distinguishable from *Duncan* in two ways. First, the Federal Circuit expressly mandated further litigation in the instant case regarding the Interior's lawfulness of transferring funds to the three communities:

That issue does not affect our analysis of the two certified questions, however, and we leave that issue to be addressed to the extent necessary, in further proceedings before the trial court.<sup>18</sup>

The Federal Circuit's declaration directly contradicts the government's argument that "a statutory use restriction in any appropriation legislation would be directly contrary to the Federal Circuit's findings and cannot be a basis for a lawsuit against the United States."<sup>19</sup>

Here, the Federal Circuit expressly left the inquiry to this Court regarding

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<sup>15</sup> *Exxon Corp. v. United States*, 931 F.2d 874, 877 (Fed.Cir.1991) (citation omitted) ("The doctrine requires a court to follow the decision on a question made previously during the case.... When a judgment of a trial court has been appealed, the decision of the appellate court determines the law of the case, and the trial court cannot depart from it on remand....")

<sup>16</sup>559 F.3d at 1240.

<sup>17</sup>109 F.3d 497, 499 (8<sup>th</sup> Cir. 1997); Def.'s Opp. Memo to Amend 6-9 (Aug. 9, 2010).

<sup>18</sup> *Wolfchild*, 559 F.3d at 1259.

<sup>19</sup> Def.'s Opp. Memo. to Amend. 9 (Aug. 9, 2010).

the origin of the federal government’s obligations to the 1886 Mdewakanton — “[t]he Interior Department recognized ...that Congress intended the 1886 Mdewakantons to be the specific beneficiaries of the Appropriations Acts.”<sup>20</sup> Furthermore, the Federal Circuit explicitly left to this Court, “*to the extent necessary*,”<sup>21</sup> for its determination the “lawfulness” of Interior’s actions through “further proceedings....”<sup>22</sup> Where in *Duncan* the trial court tried to place limitations (of time where the appellate court did not), here, the Federal Circuit did not give limitations, but *discretion* to this Court to resolve the remaining claims.

Second, unlike the Eighth Circuit discussion about expeditiousness in *Duncan*, the Federal Circuit’s holding concluded that a statutory use restriction existed and thereby, it is the law of the case.

In fact, after over six years of litigation, Plaintiffs have won on a key element of their claim – a *federal statutory obligation exists!* Specifically, to state a cognizable claim under the Tucker Act, as the United States Supreme Court expressed in *Navajo I* and *II*, the analysis must identify specific rights-creating or duty-imposing statutory or regulatory prescriptions.<sup>23</sup> The statutory prescription required by *Navajo I* and *Navajo II* have been met by the Plaintiffs — i.e., a “statutory use restriction” exists.

The Federal Circuit’s basis of its determination is found in the Appropriation

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<sup>20</sup> *Id.* at 1243.

<sup>21</sup> *Id.* at 1260 n.14 (emphasis added).

<sup>22</sup> *Id.*

<sup>23</sup> *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) (*Navajo Nation I*); *United States v. Navajo Nation*, 129 S.Ct. 1547, 1552 (2009) (*Navajo Nation II*).

Acts' text providing, among other things, "an equal amount in the value of the appropriation":

[...] And all of said money which is to be expended for lands [by the Interior Secretary] ... shall be so expended that each of the Indians in this paragraph shall receive[ ] as nearly as practicable, an equal amount in the value of the appropriation.

The Federal Circuit found, consistent with the Appropriation Acts' statutory use restriction, that "[t]he Interior Department recognized, of course, that Congress intended the 1886 Mdwakantons to be the specific beneficiaries of the Appropriation Acts..." and acted accordingly:

The Secretary of the Interior ... sought to ensure that the funds appropriated under the Act would be spent for the benefit of those individuals...The Secretary adopted a policy designed to promote Congress's intent ....<sup>24</sup>

The Federal Circuit also noted that the contemporaneous documents "make clear that the Secretary of the Interior considered himself *bound by the terms of the statutes* to reserve the usage of the 1886 lands for members of the particular beneficiary class..."<sup>25</sup> Under 25 U.S.C. § 462 of the IRA, the statutory use restriction continues in perpetuity until Congress acts to extinguish that obligation.

Hence, the communities have no statutory rights superior to the 1886 Mdwakanton statutory use restriction. Further, the 1980 Act did not repeal the Appropriation Acts "implied or otherwise" and therefore, the statutory use restriction remains as a federal obligation.<sup>26</sup>

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<sup>24</sup> *Id.* at 1243.

<sup>25</sup> *Id.* (emphasis added).

<sup>26</sup> *Id.* at 1258.

**III. Statutory obligations to Native Americans are not all trust obligations as the government contends.**

The government also misconstrues statutory use restrictions as necessarily “trust” obligations.<sup>27</sup> A statutory use restriction is something other than a trust obligation.<sup>28</sup> The Appropriation Acts’ statutory use restrictions are *limitations* on Interior’s administrative power.<sup>29</sup> The Secretary does not have greater power than statutorily permitted. Interior under IRA, 25 U.S.C. § 155 and IGRA cannot approve treasury account disbursements, community revenue allocation plans, community ordinances and community resolutions which provide a disproportionate share of community revenues to the communities without violating the statutory use restriction. Under the statutory use restriction, Interior simply doesn’t have the administrative power to provide the communities a disproportionate share of the benefits at the expense of the 1886 Mdewakanton.

**IV. The government’s opposition fails to cite any specific rights-creating or duty-imposing statutory or regulatory prescription in favor of the communities vis-à-vis the 1886 Mdewakanton.**

As the U.S. Supreme Court expressed in *Navajo I* and *II*, the analysis of Native American claims begins with identifying specific rights-creating or duty-

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<sup>27</sup> Def.’s Opp. Memo. to Amend. 8-9 (Aug. 9, 2010).

<sup>28</sup> Plaintiffs believe this case is one of first impression. To emphasize this point, an attempt to present an amicus curiae memorandum reflecting the significance, impact on federal law, Indian law, and governmental relations by the Oglala Sioux Tribe was not filed for this Court’s consideration. *See*, Plts. Mot. to Enjoin.

<sup>29</sup> *See, e.g., United States v. Creek Nation*, 295 U.S. 103, 109-110 (1935); *Cohen’s Handbook of Federal Indian Law* 421 (Nell Jessup Newton, et al., 2005 ed., Lexis Nexis 2005) (“the courts have applied the trust responsibility to limit federal administrative action”). *See also* Restatement (Third) of Trusts § 65 (2003); 25 U.S.C. §462.

imposing statutory or regulatory prescriptions.<sup>30</sup> The *Navajo I* and *Navajo II* statutory prescription for the government to establish its obligations to the communities are superior to its statutory use restriction obligations to the 1886 Mdwakanton has not been met. In fact, the government fails to cite any specific rights-creating or duty-imposing statutes or regulations that are superior to the 1886 Mdwakanton's "statutory use restriction." It is not surprising that no such statute exists since 25 U.S.C. § 462 of the IRA ensured that the benefits of the communities, later created under the IRA, would be perpetually disbursed to the 1886 Mdwakanton and that no disproportionate share would go to the communities.

**V. The government's opposition fails to cite any subsequent Congressional Act that repeals the rights of the 1886 Mdwakanton under the Appropriation Acts.**

The government's opposition fails to cite any subsequent Congressional Act that repealed 1886 Mdwakanton rights under the Appropriation Acts. The Federal Circuit determined that the government's arguments that the 1980 Act effectively repealed the Appropriation Acts have no foundation — "implied or otherwise." Nor has any other law purported to repeal the Appropriation Acts. Thus, the government's suggestion that the statutory use restriction has evaporated over time — based on Interior's choice to ignore its statutory obligations — is to again highlight for this Court the miscues of Interior and define the illegalities and injustice forced upon the 1886 Mdwakanton.

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<sup>30</sup> *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) (*Navajo Nation I*); *United States v. Navajo Nation*, 129 S.Ct. 1547, 1552 (2009) (*Navajo Nation II*).

**VI. The government's opposition fails to cite *Carcieri* because Interior can not hold land in trust for the communities without the communities being subject to the statutory use restriction.**

The government's opposition fails to cite *Carcieri v. Salazar*<sup>31</sup> -- and for a good reason. It cannot rely upon *Carcieri* to support the government's underlying legal analysis. The consequence of the U.S. Supreme Court's *Carcieri* holding is that, under the IRA, Interior cannot hold land in trust for the communities without them being subject to the statutory use restriction.

In *Carcieri*, the U.S. Supreme Court interpreted the IRA to limit Interior's authority to take land into trust "to those members of tribes that were under federal jurisdiction at the time the IRA was enacted [1934]."<sup>32</sup> Consequently, Interior cannot hold land in trust for the *post-1934 IRA* communities without recognizing the *pre-1934* Appropriation Acts' statutory use restriction. To do otherwise, Interior runs afoul of *Carcieri* and the lands held in trust for the communities are not actually in trust at all.

Interior created the communities under the IRA. Specifically, 25 U.S.C. § 462 of the IRA continued Indian beneficiary rights in perpetuity:

The existing periods of trust placed upon any Indian lands *and any restriction* on alienation thereof are extended and continued until otherwise directed by Congress.<sup>33</sup>

If the 1980 Act did not repeal the Appropriation Acts, it did not repeal the IRA-extended statutory use restriction. Thus, the Interior-created communities do not

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<sup>31</sup> \_\_ U.S. \_\_, 129 S.Ct. 1058 (2009).

<sup>32</sup> *Carcieri*, 129 S.Ct. at 1065.

<sup>33</sup> Emphasis added.

have a legal identity independent, separate, and apart from the Appropriation Acts' statutory use restriction. Consequently, nothing in the 1980 Act's references to each of the communities suggests Congressional intent to exclude 95% of the 1886 Mdewakanton from community revenues and to allow 5% of the 1886 Mdewakanton and non-1886 Mdewakanton to receive 100% of the community revenues.

**VII. The Court has jurisdiction under the Tucker Act and Indian Tucker Act regarding plaintiffs' claim for statutory use restriction.**

The Indian Tucker Act, 28 U.S.C. § 1505 (ITA), enacted in 1946, provides the United States' express consent to be sued for claims founded upon statutes that create substantive rights to money damages.<sup>34</sup> Contrary to the government's arguments at pages 11 through 14, this Court has jurisdiction under the ITA and the related Tucker Act, 28 U.S.C. § 1491.

The key jurisdictional question is whether the Appropriation Acts' statutory use restriction can fairly be interpreted as requiring compensation for Interior's breaches of the statutory use restriction. In conducting this analysis, "[i]t is enough ... that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be 'lightly inferred,' a fair inference will do."<sup>35</sup> Particular statutes or regulations may provide such a fair inference, as the Appropriation Acts' statutory use restriction does here.<sup>36</sup> In determining the effect of such statutes, the Court looks "not only to the particular statutory language, but to the design of the statute

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<sup>34</sup> *Mitchell II*, 463 U.S. at 218.

<sup>35</sup> *Apache*, 537 U.S. at 473 (citation omitted).

<sup>36</sup> *See United States v. Hvoslef*, 237 U.S. 1 (1915).

as a whole and to its object and policy.”<sup>37</sup>

This Court can fairly infer the Plaintiffs’ right to recover damages from specific provisions of the Appropriation Acts’ statutory use restriction – particularly when read harmoniously with the IRA, 25 U.S.C. § 155 and IGRA as more fully explained in the Wolfchild Plaintiffs’ cross-motion. As a preliminary matter, appropriation acts are about “money” – making it possible for Congress to use an appropriation act to create a money-mandating duty. Second, the Appropriation Acts’ statutory use restriction expressly imposes specific money-mandating duties on the government which ensures that each 1886 Mdewakanton beneficiary “shall receive[ ], as nearly as practicable, an equal amount in the value of the appropriation.”<sup>38</sup> In 1888, 1889 and 1890, Congress appropriated the money to Interior to be used to exclusively and equally benefit the 1886 Mdewakanton regardless of location. Third, the IRA, 25 U.S.C. § 462, expressly preserved and continued the statutory use restriction and allowed for the formation of the communities – because of and subject to the statutory use restriction. Under 25 U.S.C. § 155 and the IGRA, Interior was to ensure, under the statutory use restriction, that all community revenues were distributed exclusively and equally to the 1886 Mdewakanton.

Interior further satisfies the money-mandating duty test by assuming a management role over the communities, their constitutions, revenues and

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<sup>37</sup> *Crandon v. United States*, 494 U.S. 152, 158 (1990); see *Navajo*, 537 U.S. at 508.

<sup>38</sup> 26 Stat. 336.

accounts.<sup>39</sup> Every stage of the legal development of the communities and their relationship to the 1886 Mdwakanton statutory use restriction have been under Interior's control and supervision and continues to do so – e.g., Interior approval of the communities' land uses, constitutions, amendments, ordinances, resolutions, treasury account disbursements, revenue allocation plans, per capita payments as well as issuing land certificates and taking other actions.<sup>40</sup> Such Interior control and supervision over the communities is at least as comprehensive and precise as those addressing federal authority over the Quinault trust lands and its constituent timber in *Mitchell II* and the Indian property in *Apache*. Interior's supervision and control over the communities gives rise to money-mandating duties to the 1886 Mdwakanton under the standards established in *Mitchell II* and *Apache*.

The “fair[est] inference” from the text and structure of the Appropriation Acts, IRA, 25 U.S.C. § 155 and IGRA is unmistakable. After all, the Appropriation Acts mandate that Interior exclusively and equally distribute the value of the appropriation to the 1886 Mdwakanton – and the IRA, 25 U.S.C. § 155, IGRA and other statutes enhanced those benefits. Therefore, the government should be liable for damages for its breaches of the Appropriation Acts' statutory use restriction in

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<sup>39</sup> *Navajo*, 537 U.S. at 504-07; *Apache*, 537 U.S. at 473-75; *id.* at 480-81 (Ginsburg, J., concurring).

<sup>40</sup> *See, e.g.*, Federal Portfolio of Information (1979) (JA1829-2082), Lower Sioux Constitution (JA1952-57), Shakopee Constitution (JA1965-69) and Prairie Island Constitution (JA1989-97). The constitutions and applicable statutes require Interior approvals for the identified actions. Further, diminishing the communities' purported “tribal” identity is 28 U.S.C. § 1360, so-called “Public Law 280,” which requires that the laws of Minnesota of general application to private persons and private property have the same force and effect in the communities as they have elsewhere in Minnesota.

connection with its approval of disproportionate shares of community revenues being distributed to the communities.

**VIII. The United States retained its fiduciary duty to the plaintiffs since the 1980 Act did not repeal the statutory use restriction.**

Contrary to the government's opposition at pages 14 through 15, the government has a fiduciary duty to plaintiffs even if the 1980 Act transferred equitable title to the 1886 lands to the three communities because the 1980 Act did not repeal the statutory use restriction. Most importantly, the 1980 Act did not address non-land benefits – funds – such as the money collected in Interior's treasury accounts, future casino gaming revenue and community per capita payments.

Proper analysis of these legal questions involving funds requires separate analysis of Interior's handling of its statutory obligations under 25 U.S.C. § 155 from 1950 through 1982 and its handling of its statutory obligations before and after the 1988 enactment of the Indian Gaming Regulatory Act – as more fully discussed in plaintiffs' cross-motion.

**IX. The plaintiffs' claims are not barred by the statute of limitations.**

The government's statute of limitations defense based on 28 U.S.C. § 2501 is unavailing.<sup>41</sup> The government has held moneys in "trust" accounts for the Mdwakanton without notifying them. Hence, the Indian Trust Accounting Statute, Pub. L. No. 108-108, 117 Stat. 1241, 1263 (Nov. 10, 2003) (ITAS), does toll Plaintiffs' claims:

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<sup>41</sup> Def's. Opp. Memo. to Amend (Aug. 9, 2010).

[T]he statute of limitations shall not commence to run on any claim . . . concerning losses to or mismanagement of trust funds, *until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss . . .*

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ITAS covers Plaintiffs' claims for funds held and those that should have been held in treasury account nos. 147436 and 147936 for distribution and benefit to the individual Plaintiffs as beneficiaries. In another words, Interior's treasury accounts held for Indian beneficiaries fit within the plain meaning of the ITAS's use of the phrase "trust funds."

The Federal Circuit's decision that the Appropriation Acts did not create a trust, but instead a statutory use restriction, does not resurrect the government's statute of limitations defense. As this Court previously noted, ITAS applies because Interior maintained treasury accounts for the 1886 Mdewakanton beneficiaries without notifying them:

...the Department of Interior maintained for years 1886 monies in trust accounts and paid distributions to lineal descendants of loyal Mdewakanton from those accounts ... The monies held by the Department before 1980 for lineal descendants of the loyal Mdewakanton certainly fall within that definition.<sup>43</sup>

Thus, the government's statute of limitations defenses were largely disposed of in *Wolfchild I*, 62 Fed.Cl. at 547-48. The law of the case doctrine bars re-visiting these issues hence the government's arguments are unpersuasive.

Moreover, Interior has adopted regulations applicable to the administration by the Bureau of Indian Affairs of "Trust Funds For Tribes and Individual

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<sup>42</sup> 117 Stat. at 1263 (emphasis added).

<sup>43</sup> 62 Fed.Cl. at 547-48 (footnotes omitted).

Indians.”<sup>44</sup> Those regulations define “[t]rust funds” as “money derived from the sale or use of trust lands, restricted fee lands, or trust resources and *any other money that the Secretary must accept into trust.*”<sup>45</sup> The monies held by the Department between 1944 and 1982 for the 1886 Mdewakanton in U.S. treasury accounts fall within the plain meaning of “trust funds” as used in ITAS.

Additionally, the Plaintiffs claim community revenues have not been distributed in accord with the statutory use restriction -- including proceeds from the current enterprises such as casinos. Interior was required to collect communities revenues under 25 U.S.C. § 155 and IGRA for exclusive and equal distribution to the 1886 Mdewakanton beneficiaries. Interior did not collect and distribute these revenues as the law requires – causing the communities to receive a disproportionate share.

The plaintiffs’ claims based on disproportionate distribution of proceeds differ from the asset mismanagement claims at issue in *Shoshone*<sup>46</sup> which involved contentions that the United States could have secured a better price under certain leases. Unlike *Shoshone*, Interior’s mal-distribution of the communities’ revenues causing the communities to receive a disproportionate share falls within the ITAS.

Alternatively, the Federal Circuit has recognized the continuing claims doctrine applies in the instant case.<sup>47</sup> Here, the Court should apply the continuing

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<sup>44</sup> See 25 C.F.R. 115.001, et seq.

<sup>45</sup> 25 C.F.R. § 115.002 (emphasis added).

<sup>46</sup> *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339 (Fed. Cir. 2004).

<sup>47</sup> *Rosebud Sioux Tribe v. United States*, 75 Fed Cl. 15, 24-25 (2007).

claims doctrine because Interior continues to allow the communities and their members to receive each year a disproportionate amount of community revenues in violation of the statutory use restriction.<sup>48</sup> Likewise, the Court should toll the statute of limitations for separately-pled claims of plaintiff minors as they are under a legal disability. Under 28 U.S.C. § 2501 "[a] petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases." Historically, persons subject to a "legal disability" tolls a statute of limitations for minors.<sup>49</sup> Federal courts consider a minor as a person under "legal disability" in 28 U.S.C. § 2401 (same provision as in 28 U.S.C. § 2501) which permits such person to commence litigation within three years after the disability ceases.<sup>50</sup>

**X. This Court has jurisdiction to issue an order to enjoin actions repugnant to the statutory use restriction.**

The Court has jurisdiction under 28 U.S.C. § 1491(a)(2) to order Interior to set aside Interior-actions repugnant to the statutory use restriction. The government's argument that the Plaintiffs seek to change "the organic documents of the Communities which are domestic, dependent nations, who enjoy quasi-sovereign status" is unpersuasive.<sup>51</sup> Interior has consistently recognized from the communities' inceptions that the communities are legal creations of Interior subject

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<sup>48</sup> See App. 947.

<sup>49</sup> *Marcos v. United States*, 106 F.Supp. 172 (Ct. Cl. 1952).

<sup>50</sup> See *Morton v. United States*, 185 F.Supp. 211 (D.C.Ill. 1960) (interpreting minors as having "legal disability" under 28 U.S.C. § 2401); *Glenn v. United States*, 129 F.Supp. 914 (D.C. Cal. 1955) (same).

<sup>51</sup> Def's. Opp. Memo. to Amend. (Aug. 9, 2010).

to the Appropriation Acts' statutory use restriction in favor of the 1886 Mdewakanton.

Historic tribes have “sovereignty” because they have treaties with the United States. The communities have *no treaties* due to the Congressional Acts of 1863 cancelling such treaties and terminating the Minnesota Dakota tribal identity forever. All the communities have is the Appropriation Acts' statutory use restriction – no more, no less. Nonetheless, Interior relies on and promotes usage of “sovereignty” interpretations as a veil to hide its misconduct. But, the veil can be pierced. The Plaintiffs' proposed Count is an attempt to forge an appropriate remedy within the jurisdictional powers of this Court to this case. As part of the monetary judgment against the United States the Court should consider using its injunctive powers under 28 U.S.C. § 1491(a)(2) in aid of its jurisdiction to ensure the Interior fulfills its obligations to the 1886 Mdewakanton, through which the Interior exercises its authority over the communities.<sup>52</sup> Such an order would be within the Court's powers to ensure that the legal issues in the cases are fully resolved and the judgment of this Court's leads to finality.<sup>53</sup>

**XI. The February 1863 Act does provide a claim upon which relief may be granted.**

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<sup>52</sup> 28 U.S.C. § 1651 (a).

<sup>53</sup> The influence dispensed upon the Oglala Sioux Tribe through a \$1 million offer of government “controlled” IGRA funding to silence a historic tribal voice on the effect of this litigation has possibly and irrevocably altered the course of events regarding the finality of Plaintiffs' claims. Without the retention of this Court's jurisdiction through injunctive relief, the federal government may also become a powerless victim of a community's economic interests over that of the rightful claims of individual 1886 Mdewakanton. *See* Plts. Motion to Enjoin.

After the 1862 Minnesota Sioux uprising, Congress passed the Act of Feb. 16, 1863, 12 Stat. 652 (“the 1863 Act”)—that “abrogated and annulled” “all treaties between the federal government and the Minnesota Sioux and “forfeited to the United States” and “...all lands and rights of occupancy within the State of Minnesota...” With few exceptions — those who rescued white settlers from the uprising — the federal government removed all Sioux from Minnesota. Those whom remained, considered loyal, were rewarded under the 1863 Act “eighty acres in severalty to each individual ...[as] an inheritance to said Indians and their heirs forever.”

Although the Act of Feb. 16, 1863 statutorily obligated the government to acquire and set apart lands for the loyal Mdewakanton, it failed to do so. Congress has never repealed or abrogated this statutory obligation. The United States has argued that a second Congressional Act, the Act of March 3, 1863, 12 Stat. 819, abrogated or repealed the February 1863 Act. However, that argument has little merit. The plain meaning of the Act merely aligns itself with the substantive requirements of the earlier February Act. Nothing in the March 1863 Act changed, abrogated, or repealed the statutory obligation of the United States to set aside lands for the loyal Mdewakanton as delineated in the original February Act.

While the United States cannot find any legislative record to support its argument, history does reflect the abandonment of efforts to comply with the government’s statutory obligation because of white settler opposition to loyal

Mdewakanton living in close proximity to their own homes.<sup>54</sup> What few lands that were set aside, most were less than eighty acres. None of those lands purchased under the Acts of 1863, including the 1888, 1889 or 1890 lands, were within the Mdewakanton original Reservation as it existed between 1851 and 1863.

Furthermore, in most cases, lands obtained by the loyal Mdewakanton were assigned and not held in a manner to protect the individual Indian from losing his or her land to a reassignment to others despite the “inheritance” provision of the March 1863 Act. Assignments were memorialized by the issuance of certificates which conferred no right except that of possession. The United States acted completely contrary to the legislative intent of the substantive provisions of the 1863 Acts.

The Federal Circuit’s decision did not resolve the issue of the statutory obligation of the United States to have set apart the eighty acres of those lands for the loyal Mdewakanton and their heirs forever. The failure of the government to set apart the required lands pursuant to the Feb. 16, 1863 Act, Sec. 9, and as specified by the Mar. 3, 1863 Act, constitutes a violation of the statutory obligation to the loyal Mdewakanton and their heirs. Therefore, it survives the dismissal argument of the United States and remains as a claim against the federal government.

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<sup>54</sup> See HR Exec. Doc. No. 39-126, at 10(1865).

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 20<sup>th</sup> day of September, 2010, a copy of the foregoing was filed electronically with the Clerk of the Court through its ECF System and electronic notice was delivered to the parties entitled to receive notice.

Dated: September 20, 2010.

s/Erick G. Kaardal  
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